No. 17-1351

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

Plaintiffs – Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

Defendants – Appellants.

On Appeal from the United States District Court for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)

BRIEF OF 165 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICI CURIAE*[1]

Amici are 165 members of Congress who are familiar with the Immigration and Nationality Act and other laws passed by Congress related to immigration and national security concerns, as well as the interplay between those laws and constitutional guarantees. *Amici* are committed to ensuring that our immigration laws and policies both help protect the nation from foreign and domestic attacks and comport with fundamental constitutional principles, such as religious freedom and equal protection under the law. *Amici* are thus particularly well-situated to provide the Court with insight into the limitations that both the Constitution and federal immigration laws impose on the Executive Branch's discretion to restrict admission into the country, and have a strong interest in seeing those limitations respected.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

The United States is a nation built on immigration: "From its inception, our Nation welcomed and drew strength from the immigration of aliens." *In re Griffiths*, 413 U.S. 717, 719 (1973). It is also a nation built on the rule of law. As members of Congress, *amici* recognize that the President has broad authority over immigration and national security matters, but that "power is subject to important constitutional limitations," *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001), as well as statutory limitations reflected in the Immigration and Nationality Act ("INA"). The President's March 6, 2017 Executive Order ("Second Order"), just like the January 27, 2017 Executive Order ("First Order"), transgresses those constitutional and statutory limitations.

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[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

While the Second Order attempts to cure the First Order's legal infirmities, it suffers from many of the same fatal flaws and thus remains unlawful. Indeed, the President's senior advisers have expressly stated that the Second Order addresses only "very technical issues" and achieves "the same basic policy outcome" as the first.[2] The President himself described the Second Order as merely a "watered down" version of its predecessor.[3] It is thus unsurprising that the Second Order—in both practical effect and design—continues to discriminate against and target Muslims. And it is hardly narrowly tailored: it still bars entry for virtually all individuals from six Muslim-majority countries, except those who are lawful perma-

[2] *Trump Adviser Says New Travel Ban Will Have 'Same Basic Policy Outcome,'* FoxNews.com, Feb. 21, 2017, http://www.foxnews.com/politics/2017/02/21/trump-adviser-says-new-travel-ban-will-have-same-basic-policy-outcome.html.

[3] Jacob Pramuk, *Trump May Have Just Dealt a Blow to His Own Executive Order*, CNBC.com, Mar. 15, 2017, http://www.cnbc.com/2017/03/15/trump-may-have-just-dealt-a-blow-to-his-own-executive-order.html.

nent residents and visa holders. Moreover, the Order's effects are not limited to those seeking to enter the country: the Order prevents U.S. citizens, lawful permanent residents, refugees, and asylees *within the United States* from sponsoring and reuniting with any relatives who are nationals of the targeted countries. Nor can the Administration cure these ongoing defects by pointing to the Order's waiver process: "discretionary waiver provisions" are not a "sufficient safety valve" excusing compliance with the Constitution. *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017).

Thus, despite the Second Order's self-serving claims to the contrary, it delivers on President Trump's repeated promises as a candidate to limit the entry of Muslims into the country.[4] In so doing, it flies in the face of one of our most deeply rooted constitutional values: that the government must not favor (or disfavor) any particular religion. As the Constitution's text and history make clear, the Religion Clauses—both Article VI's prohibition on the use of religious tests, and the First Amendment's promise of "free exercise of religion" and prohibition on "laws respecting an establishment of religion"—prohibit a religious test that singles out a religion for discriminatory treatment under our immigration laws.

[4] *See, e.g.*, Amy B. Wang, *Trump asked for a "Muslim ban," Guiliani says—and ordered a commission to do it legally*, Wash. Post, Jan. 29, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.aa581a145c57.

The Order's religious discrimination also runs afoul of the Fifth Amendment's requirement of due process, which includes the guarantee of the equal protection of the laws. The original meaning of the Constitution confirms that those core principles of equality protect both citizen and noncitizen alike. Indeed, during debates over the Alien Act of 1798—which authorized the President to remove aliens he deemed harmful to the public peace and safety—opponents of the Act time and again emphasized the breadth of the Fifth Amendment's guarantee of due process, which "speaks of persons, not of citizens." 8 Annals of Cong. 1956 (1798). Those views ultimately carried the day, as the Act was widely viewed as unconstitutional, leaving "no permanent traces in the constitutional jurisprudence of the country." 2 Joseph Story, *Commentaries on the Constitution* § 1293, at 173 (3d ed. 1858).

Even apart from the fatal flaws of government-sponsored religious discrimination, the Order is also unlawful because it discriminates on the basis of nationality. As the Supreme Court has recognized, "even in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). This Order does not survive even rational-basis review. To begin with, it is vastly overbroad—targeting both individuals and countries in a way that does nothing to further the Order's stated purpose of "protect[ing] [U.S.] citizens from terrorist attacks, including those committed by foreign nationals," Order § 1(a). At least since 1975, not a single American has been killed as a result of terrorist attacks on U.S. soil carried out by individuals born in the six countries targeted. *See infra* at 17. Further, because the Second Order—like its precursor—denies immigration benefits based on where a person is "from," Order § 1(f), it inexplicably sweeps in individuals who plainly pose no terrorist threat, including infants and young children.

As a statutory matter, the Second Order cannot be squared with the INA, which categorically prohibits discrimination in the issuance of immigrant visas based on "nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). In enacting that provision, Congress abolished a prior quota system that was based on national origin and "unambiguously directed that no nationality-based discrimination shall occur," *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). While the Administration relies on Section 212(f) of the INA, which allows the President, under certain circumstances, to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate," 8 U.S.C. § 1182(f), that provision cannot be read—and has never been read—to authorize the sort of wholesale discrimination involved here. Indeed, interpreting the INA to allow sweeping bans based on nationality would render the later-enacted nondiscrimination provision a dead letter.

The best way to protect the security of the nation and to uphold foundational American values is to respect the Constitution's fundamental protections and the laws passed by Congress. "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

ARGUMENT

The Supreme Court has never given any President in history what this Administration now seeks—a blank check to limit entry into the country, irrespective of constitutional and statutory limitations. *See Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977). As that Court has recognized, the President's authority over immigration does not change the fundamental principle that "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *INS v. Chadha*, 462 U.S. 919, 941 (1983) (citation omitted). Nor does it eliminate the Framers' design that when other branches of government transgress constitutional boundaries, "the judicial department is a constitutional check," 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 196 (Jonathan Elliot ed. 1836) ("*Elliot's Debates*"). Thus, this Court must ensure that the President's actions comport with "important constitutional limitations," *Zadvydas*, 533 U.S. at 695, and that the President has used a "constitutionally permissible means of implementing" the authority he claims. *Chadha*, 462 U.S. at 941-42; *see Boumediene*, 553 U.S. at 765 ("Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" (citation omitted)). As the Ninth Circuit has recognized, "courts can and do review constitutional challenges to the substance and implementation of immigration policy." *Washington*, 847 F.3d at 1163.

I. BECAUSE THE EXECUTIVE ORDER DISCRIMINATES ON THE BASIS OF RELIGION, IT CANNOT BE SQUARED WITH THE CONSTITUTION'S TEXT AND HISTORY.

Despite self-serving promises of religious neutrality, *see* Order § 1(b)(iv), the Second Order—just like the first—targets Muslims, singling out nationals only from majority-Muslim countries. This is unsurprising: President Trump, while a candidate, repeatedly said that he wanted to limit Muslim entry into the country, and at least one close adviser to the President has publicly stated that the focus on nationality in the First Order was designed to implement a "Muslim ban." *See* Wang, *supra*. The Second Order is not meaningfully different, as the President and his own advisers have acknowledged. *See supra* notes 2-3. In this context, the Order's discrimination on the basis of religion, which creates a "danger of stigma and stirred animosities" toward Muslims, *see Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J., concurring), violates the Constitution.

Our Constitution promises religious freedom to people of *all* religions and nationalities. The Constitution prohibits all religious tests for federal office, providing that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3. This prohibition reflects the Framers' belief that "as all have an equal claim to the blessings of the government under which they live, and which they support, so none should be excluded from them for being of any particular denomination in religion." 2 *Elliot's Debates* at 119. The United States was conceived as a "great and extensive empire," where "there is, and will be, a great variety of sentiments in religion among its inhabitants." *Id.* at 118-19. As Reverend Daniel Shute observed during the debates in the Massachusetts ratifying convention: "[W]ho shall be excluded from national trusts? Whatever answer bigotry may suggest, the dictates of candor and equity, I conceive, will be, *None*." *Id.* at 119 (emphasis in original).

Article VI's ban on religious tests, however, was not alone sufficient to ensure religious freedom to all. In 1791, the Framers added the First Amendment to the Constitution, broadly guaranteeing the "free exercise of religion" and prohibiting the making of any "law respecting an establishment of religion." U.S. Const.

amend I. That Amendment "expresses our Nation's fundamental commitment to religious liberty": the Religion Clauses were "written by the descendents of people who had come to this land precisely so that they could practice their religion freely.... [T]he Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 881 (2005) (O'Connor, J., concurring).

As our nation's Framers noted at the time, the guarantee of free exercise and the structural prohibition on establishment together ensure that "[t]he Religion ... of every man must be left to the conviction and conscience of every man," James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 *The Writings of James Madison* 183, 184 (G. Hunt ed. 1901), and that "opinion[s] in matters of religion ... shall in no wise diminish, enlarge, or affect [our] civil capacities," Thomas Jefferson, Virginia Act for Establishing Religious Freedom (Oct. 31, 1785). These twin guarantees ensure that "[a]ll possess alike liberty of conscience .... It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. [H]appily the Government of the United States ... gives to bigotry no sanction, to persecution no assistance." Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), https://founders.archives.gov/documents/Washington/05-06-02-0135.

At the same time they added the First Amendment to the Constitution, the Framers also added the Fifth Amendment, including its Due Process Clause. That Clause —which states that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law"— "contains within it the prohibition against denying to any person the equal protection of the laws," thereby "withdraw[ing] from Government the power to degrade or demean." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). When the Framers adopted this Amendment, they made clear that its protections extend to both citizens and noncitizens alike. During debates over the Alien Act of 1798, which authorized the President to remove aliens he considered harmful to the public peace and safety, the Act was broadly denounced as "bestow[ing] upon the President despotic power over a numerous class of men," *see* Virginia Resolutions of 1798, Address to the People, 4 *Elliot's Debates* at 531, and reducing noncitizens to the status of "outlaws" subject to the "absolute dominion of one man," Kentucky Resolutions of 1798, 4 *Elliot's Debates* at 543. Although it was enacted into law, the Act was widely viewed as unconstitutional, leaving "no permanent traces in the constitutional jurisprudence of the country." 2 Joseph Story, *Commentaries on the Constitution* § 1293, at 173.

Opponents of the Alien Act time and again emphasized that the Fifth Amendment's guarantee of due process "speaks of persons, not of citizens; so far as relates to personal liberty, the Constitution and common law include aliens as well as citizens; and if Congress have the power to take it from one, they may also take it from the other." 8 Annals of Cong. 1956 (1798). Answering those who thought the government had a free hand when regulating the status of noncitizens, Edward Livingston argued that "the Constitution expressly excludes any idea of this distinction." *Id.* at 2012. As Madison pointed out, "[i]f aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or other incidents to a fair trial." Madison's Report on the Virginia Resolutions, *in* 4 *Elliot's Debates* at 556.

More than seventy years after the Founding, the Fourteenth Amendment was added to the Constitution, including its express prohibition on any state efforts to "deny to any person ... the equal protection of the laws." U.S. Const. amend XIV, § 1. The constitutional guarantee of equal protection is implicit in the Fifth Amendment's Due Process Clause, and thus requires the federal government to respect the same principles of equality that bind the States. *See Windsor*, 133 S. Ct. at 2695 ("the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved"). The equal protection guarantee reflects the enduring constitutional value of protecting all persons, regardless of whether they are citizens or immigrants coming to the United States for the first time: "[T]he patriots of America proclaimed the security and protection of law for all.... No matter what spot of the earth's surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter citizens or strangers; no matter whether rich or poor ..., this new Magna Carta to mankind declares the rights of all to life and liberty and property are equal before the law." Cong. Globe, 37th Cong., 2d Sess. 1638 (1862).

The original meaning of the equal protection guarantee "establishes equality before the law," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866), "abolishes all class legislation in the States[,] and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.* Indeed, from the very beginning, the Fourteenth Amendment's guarantee of equality was particularly important to prevent state-sponsored discrimination against immigrants. Congressman John Bingham—one of the drafters of the Fourteenth Amendment—demanded that "all persons, whether citizens or strangers, within this land ... have equal protection in every State in this Union in the rights of life and liberty and property[.]" *Id.* at 1090.

Consistent with this text and history, Supreme Court precedent confirms that the Constitution's prohibition on religious discrimination applies to all persons. As the Supreme Court has repeatedly made plain, the rule that "one religious denomination cannot be officially preferred over another" is the "clearest command of the Establishment Clause." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Indeed, that command lies at the "heart of the Establishment Clause." *Kiryas Joel*, 512 U.S. at 703; *see id.* at 714 (O'Connor, J., concurring) ("[T]he government generally may not treat people differently based on the God or gods they worship, or do not worship."); *id.* at 728-29 (Kennedy, J., concurring) ("[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion."); *id.* at 728-29 (Kennedy, J., concurring) (the Religion Clauses forbid "religious gerrymandering"). In short, "the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." *Id.* at 715 (O'Connor, J., concurring).

Free exercise principles, too, proscribe "[o]fficial action that targets religious conduct" for adverse treatment, and require courts to "'survey meticulously the circumstances of governmental categories to eliminate ... religious gerrymanders.'" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, Inc.,* 508 U.S. 520, 534 (1993) (quoting *Walz v. Tax Comm'n of N.Y. City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). In sum, "the Religion Clauses ... all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring). Similarly, discrimination by the government on the basis of religion has long been viewed as manifestly inconsistent with the basic equality guarantee that our Constitution promises to all. *See id.* at 728 (Kennedy, J., concurring)

("[T]he Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.").

It is irrelevant that the Order does not mention Muslims by name. "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Church of the Lukumi Babalu*, *Inc.*, 508 U.S. at 534; *Kiryas Joel*, 512 U.S. at 699 ("[O]ur analysis does not end with the text of the statute at issue."). Context matters, *see McCreary*, 545 U.S. at 861-62; *Kiryas Joel*, 512 U.S. at 699, and the contextual evidence that the Order singles out and stigmatizes Muslims is overwhelming. *See supra* at 7-8. Indeed, that is why the Government urges this Court to ignore this powerful evidence, insisting that it would be improper to "prob[e] the Chief Executive's subjective views." Appellants' Br. at 46. But "purpose needs to be taken seriously under the Establishment Clause," and therefore this Court must take account of "the history of the government's action," not "'turn a blind eye to the context in which the policy arose.'" *McCreary*, 545 U.S. at 874, 866 (citation omitted).

Nor does it matter that the Order does not apply to all Muslims. *See Kiryas Joel*, 512 U.S. at 705 ("Here the benefit flows only to a single sect [of a religion], but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole.”). Singling out six Muslim-majority nations (particularly after repeatedly stating the intent to ban all Muslims from the United States) establishes both a religious test and constitutes discrimination on the basis of religion. Such action is plainly inconsistent with the principles of religious freedom and anti-discrimination enshrined in our Constitution.

II. BECAUSE THE EXECUTIVE ORDER DISCRIMINATES ON THE BASIS OF NATIONALITY, IT CANNOT BE SQUARED WITH THE CONSTITUTION’S TEXT AND HISTORY OR THE IMMIGRATION AND NATIONALITY ACT.

A. The Order Violates The Fifth Amendment’s Due Process Clause Because The Order’s Broad Restrictions Based On Nationality Are Not Rationally Related To Any Legitimate Government Interests.

National origin discrimination by the government has long been viewed as manifestly inconsistent with the basic guarantee our Constitution promises to all. *See Hirayabashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”); *Korematsu v. United States*, 323 U.S. 214, 234-35 (1944) (Murphy, J., dissenting) (“Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment.”). To be sure, the federal government has greater latitude in the immigration context to regulate on the basis of nationality than it does on the basis of religion, and reasonable actions in response to demonstrable security threats will be upheld. *See, e.g.*, *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008) (9/11 attacks); *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979) (Iran hostage crisis). That does not mean, however, that the government has a blank check to discriminate against individuals based on their ancestry. *See Rajah*, 544 F.3d at 438 (actions based on "animus ... would call for some remedy").

Even if viewed only as a regulation of nationality, the Order still cannot survive. Even in equal protection cases applying "the most deferential of standards," courts "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Thus, at minimum, the government's classification must "bear a rational relationship to an independent and legitimate legislative end." *Id.* at 633. Here, the Order cannot satisfy that standard because it is vastly over-inclusive, targeting both individuals and countries in a way that does not further the Order's stated purpose of "protect[ing] [U.S.] citizens from terrorist attacks," Order § 1(a). *See Romer*, 517 U.S. at 633 (law fails rational basis review where it is "at once too narrow and too broad"); *id.* at 635 ("The breadth of the [law] is so far removed from these particular justifications that we find it impossible to credit them.").

Among other things, the Order targets six countries, Order §1(e), even though there is no evidence to suggest that broadly excluding individuals from those countries bears any rational relationship to protecting Americans from terrorist attacks. As the Ninth Circuit has observed, "[t]he Government has pointed to no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States." *Washington*, 847 F.3d at 1168. Indeed, not a single American has been killed as a result of terrorist attacks on U.S. soil carried out by individuals born in those countries since at least 1975. Alex Nowrasteh, *Guide to Trump's Executive Order To Limit Migration for "National Security" Reasons*, Cato Inst.: Cato at Liberty (Jan. 26, 2017), https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons; *see id.* ("[T]he countries that Trump chose to temporarily ban are not serious terrorism risks."). *Id.*[5] Tellingly, the Order provides only two examples of foreign nationals coming to the United States and later committing terrorist acts—one involving nationals from Iraq, who are no longer subject to the Order, and one involving a naturalized citizen from Somalia who came to the United States as a child, *see* Order § 1(h). Neither incident remotely justifies the Order's sweeping ban, which flies in the face of the government's own evidence demonstrating that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity."[6] Furthermore, because the Order denies entry based solely on nationality, it inexplicably sweeps in large categories of individuals who plainly pose no terrorist threat. *See Romer*, 517 U.S. at 633 (law fails rational basis review when "[i]t identifies persons by a single trait and then denies them protection across the board"). Infants and young children, for example, are barred under the Order's terms.

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[5] To be sure, a 2015 law and its implementing regulations provided that nationals of countries participating in the Visa Waiver Program would no longer be admitted to the United States without a visa if they had traveled to the countries identified in the Order or were dual-nationals of those countries and were not subject to a specified exception. *See* Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, Div. O, Title II, § 203 (2015); DHS Press Release, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016) (designating additional countries subject to the Act's restrictions). That 2015 law did not, however, categorically "bar [individuals subject to it from] travel[ling] to the United States," U.S. Customs & Border Protection, Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions, https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq (last visited Feb. 15, 2017); it simply prohibited such individuals from entering the country

Other facts also suggest that the Order's purported national security justifications are mere pretext. For example, Administration officials acknowledged that they delayed issuing the Second Order because they did not want to "undercut the

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without a visa. That law thus provides no precedent for this Order's nationality-based ban on admission. *See Washington*, 847 F.3d at 1168 n.7.

[6] Matt Zapotosky, *DHS Report Casts Doubt on Need for Trump Travel Ban,* Wash. Post, Feb. 24, 2017, https://www.washingtonpost.com/world/national-security/dhs-report-casts-doubt-on-need-for-trump-travel-ban/2017/02/24/2a9992e4-fadc-11e6-9845-576c69081518_story.html?utm_term=.69210392ac3f.

favorable coverage" the President was receiving.[7] The Administration's willingness to delay the issuance of the Second Order for political reasons belies any claim of pressing national security need. Similarly, the Order's ban on admission of nationals from the targeted countries is purportedly to allow time to "improve the screening and vetting protocols and procedures associated with the visa-issuance process and the [United States Refugee Admissions Program]." Order § 1(a). Yet the new Order imposes a ban on admission that is of exactly the same duration as the ban on admission in the First Order, *id.* § 2(c), thus suggesting a lack of both urgency and progress in the intervening period toward developing those improved screening protocols. Again, this belies any claim of pressing national security needs.

B. By Discriminating On The Basis Of Nationality, The Order Also Runs Afoul Of The Immigration And Nationality Act.

The INA—consistent with the constitutional principles discussed above—limits the executive branch's discretion, categorically prohibiting "discriminat[ion]" against prospective entrants in the issuance of immigrant visas based on their "nationality, place of birth, or place of residence," 8 U.S.C. § 1152(a)(1)(A). While the INA also provides the President with the power to suspend the entry of any "*class* of aliens," 8 U.S.C. § 1182(f) (emphasis added),

[7] Laura Jarrett et al., *Trump Delays New Travel Ban After Well-Reviewed Speech*, CNN.com, Mar. 1, 2017, http://www.cnn.com/2017/02/28/politics/trump-travel-ban-visa-holders/.

that provision does not override the categorical prohibition on nationality-based discrimination. Indeed, no President has ever invoked the limited discretion granted by 8 U.S.C. § 1182(f) in an attempt to enact a ban like this one. The Order runs headlong into the INA's prohibition on discrimination.

1. The INA Categorically Prohibits Discrimination Based On, Among Other Things, Nationality, Place Of Birth, Or Place Of Residence.

The INA provides that, with certain exceptions not relevant here, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). In adopting this prohibition, "Congress could hardly have chosen more explicit language," "*unambiguously direct[ing]* that no nationality-based discrimination shall occur." *LAVAS*, 45 F.3d at 473 (emphasis added). The adoption of this provision was a sharp rebuke to what had come before: a "national quota system of immigration," *id.*, according to which "the selection of immigrants was based upon race and place of birth," H.R. Rep. No. 89-745, at 8–10 (1965). By flatly "prohibiting discrimination in the granting of visas on the basis of 'race, sex, nationality, place of birth, or place of residence,'" the 1965 amendments "manifested Congressional recognition that the maturing attitudes of our nation made discrimination on these bases improper."

Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 453 (S.D. Fla. 1980) (quoting 8 U.S.C. § 1152(a)(1)(A)).

In fact, numerous members of Congress decried the prior quota system as fundamentally un-American. As one put it, the system stood "in conflict with our principles of human brotherhood and equality" and was contrary to "our basic American tradition." *Immigration: Hearings Before the Subcomm. on Immigration and Naturalization of the Comm. on the Judiciary, Senate, on S. 500*, 89th Cong. 547 (1965) (statement of Sen. Maurine B. Neuberger); *see Immigration: Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, House of Representatives, on H.R. 2580 To Amend the Immigration and Nationality Act and for Other Purposes*, 89th Cong. 418 (1965) [hereinafter *Hearings on H.R. 2580*] (statement of Rep. Benjamin S. Rosenthal) ("For all too long, America's immigration and naturalization laws have been in conflict with our national history and ideals."); *Immigration: Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, House of Representatives, on H.R. 7700 and 55 Identical Bills*, 88th Cong. 208 (1964) [hereinafter *Hearings on H.R.7700 and 55*] (statement of Rep. Harold Ryan) ("We cannot preach the ideals of democracy, and, at the same time, judge the qualifications of men because of their race or national ancestry.").

Similarly, when President Johnson signed the 1965 law, he recognized that the prior immigration system was "a cruel and enduring wrong in the conduct of the American Nation." Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill (Oct. 3, 1965). As he explained, such a system "violate[s] the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." *Id.* Testifying in support of the amendments, Attorney General Katzenbach likewise stated that the prior quota system not only "ought to be intolerable on principle alone," but also "creat[ed] incalculable harm to our Nation and to our citizens." *Hearings on H.R. 2580*, *supra*, at 8-9. Among other things, it "prevented or delayed" "brilliant and skilled residents of other countries ... from coming to this country," thereby harming our "domestic self-interest" and "self-interest abroad." *Id.* at 8. And it inflicted countless "cruelties," including "requiring the separation of families." *Id.* at 9, 8. "'This is neither good government nor good sense.'" *Id.* at 8 (quoting President Johnson); *cf. Hearings on H.R. 7700 and 55*, *supra*, at 391 (statement of Secretary of State Dean Rusk) (noting, in the context of testimony in support of the amendments, that many countries "resent the fact that the quotas are there as a discriminatory measure").

Based on this testimony, Congress made the considered judgment that we are a nation built on immigration and that immigration of worthy individuals from all corners of the globe increases our domestic tranquility. In other words, "our system of freedom is superior to the rival system of fear." *Hearings on H.R. 2580*, *supra*, at 8 (statement of Attorney General Katzenbach). The 1965 ban on discrimination in immigrant visa issuance was thus designed to prohibit the Executive from practicing wholesale discrimination against people coming from certain countries.

Despite this clear prohibition in the INA, that is precisely what the Order here commands. It directs that the "entry into the United States of nationals of those six countries be suspended," Order § 2(c), and makes clear that visas will not be issued to foreign nationals of those six countries, unless waivers are granted on a case-by-case basis, *id.* § 3(c). By its plain terms, the Order runs afoul of both the text and purpose of the INA's nondiscrimination provision. Indeed, the Administration's desired interpretation of the statute would mark a return to the system of national origin discrimination that Congress specifically abolished. That cannot be right.

2. The Provision On Which The Order Relies Cannot Override The Act's Explicit Prohibition On Discrimination.

As Judge Friendly explained shortly after passage of the 1965 amendments discussed above, even in the area of immigration, an executive officer's "invidious discrimination against a particular race or group" is a classic "abuse of discretion," and thus "impermissible." *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966). Section 212(f) of the INA—which states that "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate," 8 U.S.C. § 1182(f)—does not nullify that basic principle, nor does it override the more specific and later-enacted nondiscrimination mandate discussed above. While § 212(f) undoubtedly grants the President broad discretion, the President "may not disregard limitations that Congress has, in proper exercise of its own ... powers, placed on his powers." *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006); *see Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) ("[I]t is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course. The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue."). Indeed, reading § 212(f) to allow the sort of discrimination that the Order commands would render the later nondiscrimination provision a dead letter. *See LAVAS*, 45 F.3d at 473 ("The appellees' proffered statutory interpretation, leaving it fully possessed of all its constitutional power to make nationality-based distinctions, would render 8 U.S.C. § 1152(a) a virtual nullity.").

Significantly, to the extent Congress wanted to make exceptions to this categorical nondiscrimination rule, it did so with specificity. For instance, 8 U.S.C. § 1152(a)(1)(A) provides that the nondiscrimination provision should be applied "[e]xcept as specifically provided in ... sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title." Those provisions, in turn, permit certain preferences for, among others, immediate relatives of U.S. citizens in specified circumstances, *id.* §§ 1151(b)(2)(A)(i), 1153. In carving out those express exceptions, Congress determined that the forms of "discrimination" permitted by those programs and preferences were acceptable. Similarly, in other provisions of the Code, Congress expressly carved out exceptions to the Visa Waiver Program, *see id.* § 1187(a)(12)(A); *see also supra* note 5, thereby requiring persons from certain countries (e.g., Iraq and Syria) to undergo more rigorous screening. Congress did not carve out a similar exception for § 212(f).

Nor has § 212(f) ever been used to enact a categorical bar on entry to all aliens from a particular nation—much less millions of individuals from six nations, like those covered by the Order here. Rather, as the current Administration has recognized, § 212(f) orders "arise from a foreign policy decision to keep *certain elements* in a given country from getting a visa." U.S. Department of State, "Presidential Proclamations" (current as of February 14, 2017) (emphasis added), https://perma.cc/M2RL-6775. The power may not be used to create a blanket exclusion order; setting aside the constitutional problems raised by any such order, it would run afoul of the nondiscrimination rule that Congress added to the INA in 1965—after § 212(f) was enacted. *See supra* at 20-23.

The § 212(f) proclamations that were in effect when President Trump took office are a case in point. Proclamation 5377—issued by President Reagan in 1985 and still in effect—suspends the entry of "officers or employees of the Government of Cuba or the Communist Party of Cuba" as nonimmigrants. 50 Fed. Reg. 41329 (Oct. 10, 1985). Similarly, a 2006 Proclamation suspended the entry of "Persons Responsible for Policies or Actions That Threaten the Transition to Democracy in Belarus." 71 Fed. Reg. 28541 (May 16, 2006).

The same is true of the 1986 Proclamation by President Reagan concerning Cuban nationals, which was adopted "to tighten enforcement of the [Cuban] embargo." *See* Gerald M. Boyd, *Reagan Acts To Tighten Trade Embargo of Cuba*, N.Y. Times, Aug. 23, 1986, http://www.nytimes.com/1986/08/23/world/reagan-acts-to-tighten-trade-embargo-of-cuba.html. Because it was intended to be an adjunct to the enforcement of the embargo—and not an outright ban on the entry of Cubans—the Proclamation permitted Cuban citizens to enter the United States as nonimmigrants, to the extent permissible, or as immigrants if they were immediate relatives of U.S. citizens, were entitled to other special immigrant status, or met other criteria. 51 Fed. Reg. 30470 (Aug. 26, 1986).

These and other uses of § 212(f) are consistent with the INA's nondiscrimination provision because they apply to classes of aliens based on their past acts, not solely where they are from. Even after September 11, 2011, the

Executive did not stray from this targeted use of § 212(f).[8] By contrast, the Order here is unprecedented because it indiscriminately sweeps in virtually everyone "from" six separate nations and denies them entry no matter their status.

Finally, other efforts to square the Order with the statutory prohibition on discrimination likewise fail. For example, 8 U.S.C. § 1152(a)(1)(B), which states that nothing in the nondiscrimination provision "shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed," is not to the contrary. That provision simply allows otherwise neutral and nondiscriminatory *procedures* for processing visas, and may not be read in a way that "would render 8 U.S.C. § 1152(a) a virtual nullity," *LAVAS*, 45 F.3d at 473.

* * *

The Order violates both the Constitution and the INA. Fortunately, national security and protection of our most deeply cherished liberties are not a zero-sum game. This Court should hold unlawful the Executive Order, allowing the President to protect the nation's security in ways that comply with the Constitution and our nation's laws.

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[8] *See* Kate M. Manuel, Cong. Research Serv., *Executive Authority to Exclude Aliens: In Brief* 6-10 & tbl. 1 (Jan. 23, 2017), https://fas.org/sgp/crs/homesec/R44743.pdf.

CONCLUSION

The Court should affirm the decision of the district court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,453 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amici curiae* brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 14-point Times New Roman font.

Executed this 19th day of April, 2017.

/s/ Elizabeth B. Wydra___
Elizabeth B. Wydra

Counsel for amici curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on April 19, 2017.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 19th day of April, 2017.

/s/ Elizabeth B. Wydra___
Elizabeth B. Wydra

Counsel for amici curiae